

Sir NICHOLAS SHIREBURNE Bar.
Plaintiff.

The ARCH-BISHOP of YORK,
ROBERT HITCH Esq; HENRY
HUMPHREYS his Clerk,
The Master, Fellows, and Scholars
of TRINITY-COLLEGE in Cam-
bridge, and Dr. WOLFRAN
STUBB their Clerk,

The PLAINTIFF's Case.

In a *Quare Impedit* for the Presentation to the Church of Guisley in Yorkshire.

TIS agreed by all Parties, That the Advowson of this Church did belong to Catherine Wife of Sir Ralph Nevile: That she died, leaving three Daughters, Co-heirs; viz. Catherine Wife of Walter Strickland Esq; Joan Wife of Sir John Constable, and Clare Wife of Thomas Nevile Esq; That upon Partition made of their Estates, it was agreed, That Walter Strickland Esq; and Catherine his Wife, should present every First, Sir John Constable and Joan his Wife every Second, and Thomas Nevile Esq; and Clare his Wife every Third Turn.

1st Turn.
2d Turn.
3d Turn.

The Master, Fellows, and Scholars of Trinity College in Cambridge claim the First Turn.

The Plaintiff Sir Nicholas Shireburne has set forth his Title to the Second.

And the Defendant Hitch is not denied the Third. But whose Turn it was to present upon the Death of the last Incumbent, is the Subject Matter of the present Dispute. Each of the said Parties say, 'tis their Turn now to present: So there's nothing in the Merits of this Cause, but whether this be the First, Second, or Third Turn, which ought certainly to have been tried by a Jury: And Trinity College offered a fair and issuable Plea, upon which Issue was joined, in order to try it at the Assizes whose Turn it was: But the Defendant Hitch contriv'd it so by pleading a bad Plea, upon which no Issue could be joined, (his Traverse upon which the Plaintiff was to join Issue being of a Matter not alledged in the Plaintiff's Declaration) that the Plaintiff was forced to demurr specially to his Plea instead of taking Issue: And this Traverse of the Defendant was held naught by both Courts of Common Pleas and Queen's Bench, and 'tis presumed will not be insisted on before your Lordships.

The College
and the Plain-
tiff come to an
Agreement.

After this Plea was adjudged naught in the Common Pleas, and the Plaintiff's Declaration held good, the College (not doubting but the Plaintiff's Title was good against the Defendant Hitch) came to an Agreement with the Plaintiff upon a Person to be presented; and the Plaintiff being willing to present Mr. John Hacket, one of the Fellows of Trinity College, whom They (after Dr. Wolfran Stubb resigned) had already presented in their First Turn, consented this Presentation should be made by the Plaintiff as in the Second Turn. So Mr. Hacket was accordingly presented by the Plaintiff; whereupon the College entered a *relicta verificatione* in the Common Pleas, acknowledging this to be the Plaintiff's second Turn; and upon Judgment obtained by the Plaintiff in the Common Pleas, and a Writ to the Bishop, Mr. Hacket was admitted, instituted, and inducted, and is now in possession.

After the *relicta verificatione* entered by the College, the matter stood on the point of Pleadings only between the Plaintiff and Defendant Hitch; but the College and the Plaintiff became, and are still concerned in Interest to keep in the Clerk by both presented; and for quietness sake offered to consent by Deed, that Hitch should present the next time as in his Third Turn, which is now the only way to settle the Turns for the future; which the Defendant Hitch would not accept of, but brought a Writ of Error in the Queen's Bench, where his Plea was again held bad; yet upon some Objections to the Plaintiff's Declaration the Judgment in the Common Pleas was reversed.

Wherefore to set aside the Judgment of the Queen's Bench, and to affirm that of the Common Pleas, this Writ of Error is brought before your Lordships, where the sole Question will be (presuming the Defendant Hitch will not insist on his Plea) whether the Objections that were taken to the Plaintiff's Declaration were sufficient to reverse the Judgment of the Court of Common Pleas or no.

The Declaration, so much of it as is to the point in question, stands thus: The Plaintiff hath by several Conveyances and many Descents in his own Family made himself a Title to the Second Turn.

He alledges, That the Right of Walter Strickland and his Wife to present in every first Turn *per debitam legis Conveiantiam in ea parte facti debito modo conveyat* finit to Robert Hitch the Defendant's Grandfather, and his Heirs: And that Hitch the Grandfather being so seized while the Church was full in *debita Juris forma*, granted to one Mark Breary Merchant the first and next Avoidance; and that afterwards the Church became void by the Death of the then last Incumbent, which was the first Vacancy after the said Grant to Mark Breary. Upon which Mark Breary presented William Breary his Clerk in the first Turn, who was admitted, instituted, and inducted. That the Church became void by the Death of the said William Breary, and is yet void, and therefore it belongs to the Plaintiff to present in his Turn aforesaid.

There were two Objections taken to the Declaration: But the Judgment of the Queen's Bench seems to be grounded on the latter.

1 Object.
2 Object.

That the Plaintiff had not laid any Presentation, made by him or any of his Predecessors, in the second Turn.

That he had taken upon him to acknowledge a Title to the first Turn in the Defendant Hitch, but had not set out the Conveyances particularly by which it was derived down to him.

Which Objections we presume will receive these Answers.

Answ. 1 Obj.

Tho' a *Quare impedit* be a possessory Action, and generally a Possession by a Presentation ought to be laid in some Person under whom the Plaintiff claims; yet this is an Exception to that Rule; for the Right appearing to be in three Co-partners, or in those that claim under them, if a Presentation be alledged in any one of the Co-partners, or any that claim under them, it is sufficient; as appears by several Authorities in Law: And this Objection was little insisted on in either of the Courts below.

Answ. 2 Obj.

And as to the Plaintiff's not setting out particularly in *ipidem verbis* the Conveyances which make the Defendant Hitch's Title to the first Turn, 'tis impossible for the Plaintiff to do it.

1st,

Because the Deeds belong not to the Plaintiff, nor is he Party or privy to them; and he has tried in Chancery to have had them set forth, and has been denied.

2dly,

He has no Right to demand, nor Remedy to compel his Adversary (claiming as a Purchaser) to disclose his Title.

3dly,

It is expressly alledged, That the Title came *per debitam legis Conveiantiam* to the Defendant's Grandfather, which is enough for a Stranger to do, and sufficient to draw the Defendant to disprove it, if false, since it is a matter in his own Cognizance; but so unknown to the Plaintiff, that he cannot amend his Declaration in that particular, if it was now to be drawn again; and 'tis hard the Plaintiff should have a Right to the Presentation, and yet not be able to come at it without his Adversary's Consent, which he cannot be supposed willing to give.

4thly,

The Plaintiff has several Authentick Precedents, where the Pleadings are the same with His; and the Defendant Hitch has little reason to except to this way of Pleading, since he does the same thing in his own Plea more than once: And the Plaintiff is advised there can be no sufficient reason given, why it should be required of Him to set out particularly the Defendant's Conveyances; neither does he know of any former Judgment to warrant the Resolution given in this Cause by the Court of Queen's Bench. Wherefore he humbly hopes your Lordships will not allow of such an Objection to overthrow the Plaintiff's Title, when (as it has already been observ'd) it is by the Defendant's pleading a bad Plea, that the Merits of this Cause could not be tried by a Jury; and since the Defendant has chosen to rely on the said Plea, which by both Courts has been adjudg'd naught, and notwithstanding the Plaintiff demurr'd specially on purpose to shew him its Fault, the Defendant did not think fit to amend it, and try the Merits. Wherefore he humbly prays your Lordships to reverse the Judgment of the Queen's Bench, and to confirm the Judgment given for the Plaintiff in the Court of Common Pleas.

JA. MOUNTAGUE.
P. KING.